



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: DECEMBER 05, 2022

IN THE MATTER OF:

Appeal Board No. 625189

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board No. 625189, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed July 27, 2022, insofar as they overruled the initial determination reducing the claimant's right to receive future benefits by 112 effective days and charging a civil penalty of \$2,209.50 on the basis that the claimant made willful misrepresentations to obtain benefits when certifying weekly from March 29, 2020 through June 28, 2020.

Also in Appeal Board No. 625189, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed July 27, 2022, insofar as they overruled the initial determination reducing the claimant's right to receive future benefits by 72 effective days and charging a civil penalty of \$604.80, on the bases that the claimant made willful misrepresentations to obtain benefits when certifying weekly from September 6, 2020 through November 1, 2020.

In Appeal Board No. 625190, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed July 27, 2022 insofar as they overruled the initial determination reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$100 on the basis that the claimant made willful misrepresentations to obtain benefits when certifying weekly from July 5, 2020 through October 18, 2020.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant has been employed part time as a school crossing guard by the employer county civil service since May of 2011. The claimant works Mondays through Fridays, for 4 1/2 hours each day.

Prior to March 2020, the claimant was also employed as a bartender at a restaurant. As a result of the COVID 19 public health emergency, schools were closed as of March 17, 2020, and the restaurant where the claimant tended bar closed on or around March 25, 2020.

Since the schools were closed, the claimant did not have to report to her job as a crossing guard. However, the claimant continued to be paid her regular salary for her usual hours in connection with her county job through the beginning of September 2020, when the schools reopened and the claimant went back to reporting to work, after which she worked her usual schedule of 4 and 1/2 hours a day, five days a week through at least November 1, 2020. In addition, the claimant received one day of holiday pay during each week ending July 5, September 13, September 28, and October 18, all in 2020 from the employer county.

After the restaurant where the claimant worked as a bartender closed, the claimant applied for unemployment benefits on March 25, 2020. Thereafter, the claimant read the claimant handbook, which included instructions for certifying weekly. The handbook provides, "You must report any work. When you claim weekly benefits, you must tell us about any work, including part-time or temporary work, unpaid jobs, or self-employment . . ." The handbook states further, "If you work more than three days or earn more than the maximum benefit rate \$504 in a week, you are not eligible for benefits for that week."

The claimant certified for benefits each week from the week ending March 29, 2020 through the week ending November 1, 2020. Each week when she certified, the claimant was asked how many days she had worked during the previous week, and whether she had received vacation or holiday pay that week. Each week the claimant indicated that she had not worked any days, except for the week ending May 31, 2020, when she reported that she had worked one day, and that she had not received vacation or holiday pay. The claimant reported one day of work in the week ending May 31, 2020 because her boss at the restaurant asked her to come in and help for one day. The certification questions asked each

week did not refer to a particular employer, but were general questions about the number of days worked during the prior week.

Although the claimant knew that the question asked each week asked her to report "any work," she assumed the questions were about the bartending job she had lost. The claimant tried to call the Department of Labor to confirm whether her belief was accurate, but could not get through. She did not make other attempts, by email or by secure message through her unemployment account portal.

OPINION: There having been no appeal from those parts of the July 27, 2022 combined hearing decisions that sustained the initial determinations holding that the claimant was not totally unemployed, and charging the claimant with the recoverable overpayment of regular, PEUC, and FPUC benefits, the Board is bound by the findings of fact and decisions on those issues. Those facts and conclusions by which the Board is bound include that the claimant was not totally unemployed from March 23, 2020 through November 1, 2020; that she

certified weekly for benefits during this period; and that those certifications included factually false statements, since the claimant failed to report her continued employment, the number of days she had worked the previous week, and her receipt of holiday pay.

However, the evidence also establishes, and the hearing Judge found, that although the claimant continued to receive her regular pay during the period from March 23, 2020 through June 28, 2020, she did not perform any services for the employer county during that time, and worked only one day at the restaurant during the week ending May 31, 2020, which the claimant reported when she certified that week. Since the claimant did not actually perform any work for the employer, we find that she could not have known that the fact that she continued to receive her salary would be considered work for unemployment insurance purposes. Rather, the question regarding the number of days worked, when the claimant was not performing any services for the county, required the claimant to render a legal conclusion. We find that the claimant's failure to render the correct legal conclusion in these circumstances precludes a knowing and intentional false response. See generally, Appeal Board No. 613184. Accordingly, we conclude that the claimant's certifications during this period, though factually false, were not wilful misrepresentations.

The Board is also bound by the finding that the claimant received one day of holiday pay during the week ending July 5, 2020, and that when she certified for benefits that week she did not report this fact. The hearing Judge found and concluded that the claimant's certification for that week was factually false; we find that this factually false certification was also a wilful misrepresentation. Although the claimant contends that she believed she was answering the certification question with respect to her restaurant employment, the question does not refer to a particular employer, but asks the general question of whether the claimant had received holiday or vacation pay. The claimant knew that she had, yet falsely responded that she had not. Accordingly, we find that the claimant's certification for the week ending July 5, 2020 was a wilful misrepresentation, and hold that the forfeit penalties in connection with that week were properly imposed.

Finally, we find that the claimant's false certifications beginning in September 2020, after she returned to work as a crossing guard, were not only factually false, as found by the hearing Judge, but were also wilful misrepresentations. The question with which the claimant was presented each week when certifying asked her to report the number of days she worked the previous week, with no reference to a particular job or employer. This question is in plain language and is straightforward, and requires no specialized knowledge or legal analysis to answer accurately. The claimant knew or should have known from both the plain language of the question, and the instructions included in the claimant handbook, that when she certified, she was required to report the days she worked. The claimant performed work for the employer county five days during each week beginning with the week ending September 6, 2020, yet reported that she had worked "0" days each week. Since the claimant knew she had worked on five days during each week, her false statements upon certifying weekly beginning with the week ending September 6, 2020 and through the week ending November 1, 2020, were wilful misrepresentations, and the forfeit penalties with respect to these certifications were properly imposed.

The issues of total number of forfeit penalty days imposed and the total amount of monetary penalty charged, are referred to the Department of Labor for recalculation consistent with this decision.

DECISION: In Appeal Board No. 625189, the decision of the Administrative Law Judge, insofar as appealed from, is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 625189, the initial determination reducing the claimant's right to receive future benefits by 112 effective days and charging a civil penalty of \$2,209.50 on the basis that the claimant made willful misrepresentations to obtain benefits when certifying weekly from March 29, 2020 through June 28, 2020, is overruled.

In Appeal Board No. 625189, the initial determination reducing the claimant's right to receive future benefits by 72 effective days and charging a civil penalty of \$604.80, on the basis that the claimant made willful

misrepresentations to obtain benefits when certifying weekly from September 6, 2020 through November 1, 2020, is sustained.

In Appeal Board No. 625190, the decision of the Administrative Law Judge, insofar as appealed from, is reversed.

In Appeal Board No. 625190, the initial determination, reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$100 on the basis that the claimant made willful misrepresentations to obtain benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

The issues of total number of forfeit penalty days imposed and the total amount of monetary penalty charged, are referred to the Department of Labor for recalculation consistent with the Board's decision.

JUNE F. O'NEILL, MEMBER